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No. 00-1577

Supreme Court of The United States

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY

Petitioner,

V.

WILBERT RIDEAU

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF

ON BEHALF OF THE
LOUISIANA DISTRICT ATTORNEYS ASSOCIATION

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QUESTION PRESENTED

Whether discrimination in the selection of grand jury members, resulting in the underrepresentation of African Americans or any other minority, requires reversal of the conviction of the defendant and dismissal of the original indictment against him.

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INTEREST OF AMICUS

The interest of Amicus[1] in this case is to urge this Honorable Court to reexamine the present remedy under *Vasquez, v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed. 2d 598 (1986)*, with regard to discrimination in state grand jury selection procedures resulting in underrepresentation of African American or other minority groups, thus violating the Fourteenth Amendment, and fashion a new remedy thereby invoking a case-by-case harmless error standard of review. The effect of such a holding would also serve to reverse the ruling of the United States Court of Appeal for the Fifth Circuit in the instant, as urged by the State of Louisiana, in its brief.

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[1] Pursuant to Rule 37.6, this brief was written in whole by Amicus counsel and its membership. Further, Amicus received no contributions, monetary or otherwise, from any source other than the Louisiana District Attorneys Association, for the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court has historically found that racial discrimination in state grand jury procedures resulting in an underrepresentation of African American or other minority groups violates the Fourteenth Amendment. Although *Vasquez v. Hillery*, 474 U.S. 254, 260-261, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) affirmed the appropriateness of mandatory reversal of the defendant's conviction when this rule is violated, *Amicus* respectfully urges this Honorable Court to reexamine the present remedy.

This Court has consistently held that certain constitutional violations may be reviewed under the harmless error standard. *Vasquez* as currently applied, elevates violations in the grand jury process of this sort to a status above other constitutional safeguards which are reviewed for harmless error. *Amicus* contends that this rule should be reversed and a case by case analysis be adopted. Such analysis should balance harm from a racially discriminatory grand jury selection process, with the fairness of the entirety of the criminal process.

ARGUMENT

I. DISCRIMINATION IN THE SELECTION OF GRAND JURY MEMBERS, RESULTING IN THE UNDERREPRESENTATION OF AFRICAN AMERICANS OR OTHER MINORITY GROUPS DOES NOT REQUIRE AUTOMATIC REVERSAL OF THE CONVICTION OF THE DEFENDANT OR DISMISSAL OF THE INDICTMENT.

Since 1880, this Court has upheld the principle that racial discrimination in state grand jury selection is unquestionably a violation of the Fourteenth Amendment. *Vasquez v. Hillery*, 474 U.S. 254, 260-261, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) *and cases cited therein*. *Amicus* neither contests this principle nor condones its violation. However, since that earlier time, this Court has held that the appropriate and automatic remedy for this constitutional violation is the mandatory reversal of the conviction of the criminal defendant who was indicted by the grand jury. *Id.* *Amicus* believes that the time is appropriate to reconsider the remedy for this type of constitutional violation.

Considerations of *stare decisis* do not preclude this

Court from reconsideration of an appropriate remedy. "[P]articularly where constitutional issues are involved '[t]his Court has shown a readiness to correct its errors even though of long standing.'" *Vasquez*, 474 U.S. at 269 (Powell, J. dissenting), *citing United States v. Barnett*, 376 U.S. 681, 699, 84 S.Ct. 984, 994, 12 L.Ed.2d 23 (1964). In referring to the application of *stare decisis* in affirming the appropriateness of mandatory reversal in *Vasquez*, this Court supplied the very reasons for which *Amicus* now seeks reconsideration of the penalty--changes in society and changes in the law. *Vasquez*, 474 U.S. at 266 ("Every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.").

Mandatory reversal of the criminal conviction where racial discrimination in the grand jury proceeding is found has been supported by several rationales. The *Vasquez* majority found that "intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under

color of state authority, and wholly within the power of the State to prevent." *Vasquez*, 474 U.S. at 262; *see also Rose v. Mitchell*, 443 U.S. 545, 561, 99 S.Ct. 2993, 3003, 61 L.Ed.2d 739 (1979). Violation(s) of constitutional rights by a government authority, however, are not limited to racial discrimination in grand jury proceedings. For example, illegal searches and seizures and coerced confessions are serious constitutional violations. However, as will be discussed further *infra*, mandatory reversal of criminal convictions is not considered an appropriate remedy for these and many other constitutional errors.

The *Vasquez* Court reasoned that mandatory reversal of conviction was the only effective remedy for this type of Fourteenth Amendment violation and that mandatory reversal was not disproportionate to the evil that it sought to deter. *Vasquez*, 474 U.S. at 262. Amicus respectfully submits that racial discrimination in the grand jury selection process has been made, for all practical purposes, obsolete by the widespread adoption of prophylactic laws and procedures which assure minority participation in all phases of the grand and petit jury

process. We further suggest that, there was no prejudice to this particular criminal defendant, therefore, mandatory reversal is clearly unnecessary in the instant case.

The *Vasquez* Court determined that the grand jury's decisions had an effect on the subsequent criminal trial which could not be discounted. The Court found the grand jury has the power to determine the grade of the offense charged, the number of the counts and whether a case should be charged as a capital offense. *Vasquez*, 474 U.S. at 263. Amicus agrees, but suggests that any prejudice to the process is purged by a subsequent constitutional trial. No matter which charging instrument is used to bring a charge against a defendant, (indictment; information; affidavit) the state must still prove the charge against the defendant beyond a reasonable doubt in order to secure a conviction. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2871, 61 L.Ed.2d 560 (1979). As noted by Justice Jackson in his dissent in *Cassell v. Texas*, 339 U.S. 282, 302, 70 S.Ct. 629, 639, 94 L.Ed. 839 (1950).

> The grand jury [as opposed to the trial jury] is a very different institution. The States are not

> required to use it at all. Hurtado v. People of State of California, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232. Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried.

Vasquez held that "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.*, 474 U.S. at 263. Insofar as this statement suggests that a racial motive might be present in the initial charging of a defendant, the Court is correct that a violation of the Fourteenth Amendment might have occurred.

Such a violation is unconstitutional and is denounced by *Amicus*. However, this observation in no way supports the conclusion that mandatory reversal is the appropriate and automatic remedy for such a violation. Amicus suggest that this Honorable Court adopt a balancing test by which errors in the grand jury selection process are considered in the context of an evaluation of the entire trial process.

II. THE GRAND JURY DOES NOT DECIDE GUILT OR INNOCENCE OF A PARTY AND THEREFORE ERROR SHOULD NOT REQUIRE REVERSAL.

The *Vasquez* Court held that a reviewing court could neither indulge in a presumption of regularity nor evaluate the resulting harm when constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment. *Vasquez*, 474 U.S. at 263. This finding results from two false premises. First, as will be discussed *infra*, reviewing courts are routinely called upon to evaluate the resulting harm when constitutional error occurs. Second, a grand jury does not bring a defendant to judgment; a grand jury brings a defendant to trial. Only after a constitutionally valid trial is a judgment of

conviction obtained. In support of its position, the *Vasquez* Court cited cases dealing with a biased judge or a biased petit jury. *See Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 399 (1976); *Vasquez*, 474 U.S. at 263. Yet this support begs the question whether a harmless error analysis is appropriate for this pretrial constitutional error once a conviction is obtained after a constitutionally fair trial. The *Vasquez* Court held that, like these fundamental *trial* flaws, "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Id.*, 474 U.S. at 263-264. However, the grand jury is not the ultimate criminal tribunal. The trial is the criminal tribunal which determines the guilt or innocence of the defendant. The grand jury is merely a charging instrument which brings a case to trial. As this Court has held, "[i]t is well settled that deprivations of constitutional rights that occur before trial are no bar to conviction unless there has been an impact upon the trial itself." *Rose v. Mitchell*, 443 U.S. at 576, 99 S.Ct. at 3010 (Stewart, J. concurring).

III. CONSTITUTIONAL VIOLATIONS IN THE GRAND JURY PROCESS SHOULD BE REVIEWED UNDER THE HARMLESS ERROR STANDARD.

This Court has recognized that most constitutional errors can be harmless. *Neder v. United States*, 119 S.Ct. 1827, 1833 (1999). The continued viability of the reasoning of *Vasquez* and the cases cited therein, which demand mandatory reversal of a criminal conviction, elevates this particular Fourteenth Amendment violation over other constitutional violations which are reviewed for harmless error. *See Chapman v. California*, 386 U.S. 18, 21-24, 87 S.Ct. 824, 826-828, 17 L.Ed.2d 705 (1967) (Fifth and Fourteenth Amendment violation by trial judge's improper comment on the defendant's failure to testify reviewed for harmless error); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) (Sixth Amendment Confrontation Clause violation by use of co-conspirator confession reviewed for harmless error); *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (Sixth Amendment denial of counsel at preliminary hearing reviewed

for harmless error); *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) (Fifth and Sixth Amendment violations by use of confession obtained in violation of right to counsel reviewed for harmless error); *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (Fourth Amendment violation for pretrial illegal arrest reviewed for harmless error); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) (Sixth Amendment violation of right to competent counsel requires showing of prejudice); *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 393 (1984) (Fifth Amendment violation based on discriminatory selection of federal grand jury foreperson reviewed for harmless error); *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (Fifth Amendment violation based on coerced confession reviewed for harmless error). As pointed out by Justice Powell in *Vasquez*:

> Grand jury discrimination is a serious violation of our constitutional order, but so also are the deprivations of rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to which we have applied harmless-error analysis or an analogous prejudice requirement.

> Moreover, grand jury discrimination occurs *prior* to trial, while the asserted constitutional violations in most of the above-cited cases occurred *during* trial. The Court does not adequately explain why grand jury discrimination affects the "integrity of the judicial process" to a greater extent than the deprivation of equally vital constitutional rights, nor why it is exempt from a prejudice requirement while other constitutional errors are not.

Vasquez, 474 U.S. at 271 (Powell, J. dissenting).

Constitutional violations which this Court has deemed "structural" errors, and thus remedied only by automatic reversal, are a very limited class of cases. *Neder*, 119 S.Ct. at 1833. In fact, the cases listed by this Court as being in that very limited class in *Neder* are:

> *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 Ll.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*,

508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction).

Neder, 119 S.Ct. at 1833. This Court should note that the only case cited which requires automatic reversal for a pretrial constitutional violation is *Vasquez*; all of the other cases cited in this group involve constitutional violations in the trial context.

That such an unyielding remedy was first fashioned for grand jury racial discrimination is not surprising. "The true spirit and meaning of the amendments ... cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish." *Strauder v. West Virginia*, 100 Otto 303, 100 U.S. 303, 306, 25 L.Ed. 664 (1880). The earlier cases decided by this Court involved discrimination both in the selection of the grand jury as well as the petit jury which determined the guilt or innocence of the criminal defendant. The evil of racial discrimination in the administration of the criminal justice system was the evil which mandatory reversal sought to deter. *Rose v. Mitchell*, 443 U.S. at 554-555.

Racial discrimination in the selection of grand jurors is unquestionably a violation of an important constitutional right. Yet the automatic and mandatory remedy of reversal of a conviction where a trial jury, selected without discrimination, has subsequently found a criminal defendant guilty of a crime beyond a reasonable doubt, is no longer appropriate. There are other important principles in our system of law which must be considered. "No conviction should be set aside for errors not affecting substantial rights of the accused." *Cassell*, 339 U.S. at 299 (Jackson, J. dissenting). In addition, "[a]bsent an infringement of the fundamental right to fairness that violates [equal protection], there is no basis upon which to reverse petitioner's conviction or dismiss the indictment." *Hobby v. United States*, 468 U.S. 339, 346, 104 S.Ct. 3093, 3097, 82 L.Ed.2d 260 (1984). Valid convictions must not be reversed on collateral attack on the basis of claims that have nothing to do with a criminal defendant's guilt or innocence. *Rose v. Mitchell*, 443 U.S. at 586 fn 8 (Powell, J. concurring).

CONCLUSION

Amicus respectfully requests that this Honorable Court reconsider *Vasquez* insofar as its holding requires automatic and mandatory reversal of a criminal conviction for racial discrimination in the selection of grand jury members when there has been a subsequent constitutionally fair trial. The present case presents an excellent example for the necessity of a harmless error rule in such circumstances. *Amicus* would therefore urge this Honorable Court to adopt a system of case-by-case analysis, whereby a reviewing court may balance the racially discriminatory grand jury selection process with the fairness of the entire criminal process.